

Human Rights Regulations
Frequently Asked Questions #5
11/19/03

Section of Regulations	Clarification Requested	Clarification Provided
Offices, compositions and duties 12 VAC 35-115-250 A, 6	<p><u>Section of the regulation in question:</u></p> <p>12 VAC 35-115-250. Offices, composition and duties. A. Providers and their directors shall: 6. Assure that appropriate staff attend all LHRC meetings to report on human rights activities as directed by the human rights advocate or the LHRC bylaws.</p> <p><u>Clarification requested:</u> Does this section mean that appropriate staff attend ALL meetings or appropriate staff attend all meetings “as” directed by the LHRC bylaws or the human rights advocate.</p>	<p>This section does not mean that staff need to attend all LHRC meetings unless their particular LHRC or advocate requires this.</p> <p><u>LHRC:</u> Each LHRC will have Bylaws that indicate how the committee will operate and carry out its duties. LHRCs that serve more than one provider might include in either their Affiliation Agreement or in the LHRC Bylaws a schedule of attendance for affiliates. (OHR recommends that the LHRC provide information regarding under what circumstances a provider will be excused from attending a required meeting.) This schedule would indicate when each affiliate would be required to attend LHRC meetings to report on human rights activities. The</p> <p><u>Advocate:</u> This section also means that providers are required to attend LHRC meetings when the advocate requires that they do so. Advocates will not require attendance unless there is some legitimate reason that the provider needs to be there, e.g., to present a particular report.</p>

<p>Participation in Decision Making 12 VAC 35-115-70 A. 1,2,3,4 12 VAC 35-115-70 B.1,2,3,7,9</p>	<p><u>Section of the regulation in question:</u></p> <p>12 VAC 35-115-70. Participation in decision making.</p> <p>A. Each individual has a right to participate meaningfully in decisions regarding all aspects of services affecting him. This includes the right to:</p> <ol style="list-style-type: none"> 1. Participate meaningfully in the preparation, implementation and any changes to the individual's services and discharge plans. 2. Express his preferences and have them incorporated into the services and discharge plans consistent with his condition and need for services and the provider's ability to provide. 3. Object to any part of a proposed services or discharge plan. 4. Give or not give consent for treatment, including medical treatment. See Consent 12 VAC 35-115-30. <p>B. The provider's duties.</p> <ol style="list-style-type: none"> 1. Providers shall respect, protect, and help develop each individual's ability to participate meaningfully in decisions regarding all aspects of services affecting him. This shall be done by involving the individual, to the extent permitted by his capacity, in decision-making regarding all aspects of services. 2. Providers shall ask the individual to express his preferences about decisions regarding all aspects of services that affect him and shall honor these preferences to the extent possible. 3. Providers shall give each individual the opportunity, and any help he needs, to participate meaningfully in the preparation of his services plan, discharge plan and changes to these plans, and all other aspects of services he receives.... <p>□</p> <ol style="list-style-type: none"> 7. If the capacity of an individual to give consent is in doubt, the provider shall make sure that a professional qualified by expertise, training, education, or credentials and not directly involved with the individual conducts an evaluation and makes a determination of the individual's capacity. <p>□</p>	<p>While MR day support and residential programs are service providers, in many instances such entities will be providers of treatment as well.</p> <p>Services: The decision about where one lives or actually goes for the day is a service decision, not a treatment decision. In all instances, a consumer has the right to participate meaningfully in decisions re: all aspects of services that affect him. Included in this is the right to express his preferences and have them incorporated into his services plan consistent with his condition, need for services, and the provider's ability.</p> <p>Treatment: A consumer also has the right to give or not give consent for treatment. There are two different kinds of consent.</p> <p><u>Consent</u> need only be a voluntary and expressed agreement.</p> <p><u>Informed consent</u>: The standard for informed consent is higher. Informed consent requires understanding by the individual of certain kinds of information, including the risks and benefits of a proposed course of action. Informed consent, as opposed to simple consent, is needed only for certain types of treatment, for participation in human research and for disclosure of information.</p> <p>Definitions to consider:</p> <p>“Consent” means the voluntary and expressed agreement of an individual, or that individual's legally authorized representative if the individual has one. Informed consent is needed to disclose information that identifies an individual receiving services. Informed consent is also needed before a provider may provide treatment to an individual which poses risk of harm greater than that ordinarily encountered in daily life or during the performance of routine physical or psychological examinations, tests, or treatments, or before an individual</p>
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<p>Provider requirements for reporting to the department. 12 VAC 35-115-230 C. 2., 3. and 4</p>	<p><u>Section of the regulation in question:</u> 12 VAC 35-115-230. Provider requirements for reporting to the department. C. Providers shall collect, maintain and report the following information concerning seclusion and restraint: 2. The director of a service licensed or funded by the department shall submit an annual report of each instance of seclusion or restraint or both by the 15th of January each year, or more frequently if requested by the department. 3. Each instance of seclusion or restraint or both shall be compiled on a monthly basis and the report shall include but not be limited to the following:</p> <p>a. Type(s) to include:</p> <p>(1) Physical restraint (manual hold). (2) Mechanical restraint. (3) Pharmacological (chemical restraint). (4) Seclusion.</p> <p>b. Rationale for the use of seclusion or restraint to include:</p> <p>(1) Behavioral purpose. (2) Medical purpose. (3) Protective purpose.</p> <p>c. Duration of the seclusion or restraint, as follows:</p> <p>(1) The duration of seclusion and restraint used for behavioral purposes is defined as the actual time the individual is in seclusion or restraint from the time of initiation of seclusion or restraint until the individual is released. (2) The duration of restraint for medical and protective purposes is defined as the length of the episode as indicated in the order.</p> <p>4. Any instance of seclusion or restraint that does not comply with these regulations or approved variances, or that results in injury to an individual, shall be reported to the legally authorized representative, as applicable, and the assigned human rights advocate within 24</p>	<p><u>Aggregate Reports to State:</u> 12 VAC 35-115-230(C) (3) requires reports to be <u>compiled</u> on a monthly basis for submission to the Department January 15 of every year, or more frequently if requested. These reports must include, but not be limited to the type, rationale and duration of each episode of seclusion and restraint.</p> <p>(For state facilities, 35-115-230(C)(1) states that the director “shall report allegations of seclusion and restraint in accordance with all applicable operating instructions issued by the commissioner or his designee.” The Department is in the process of implementing a new database for entry of seclusion and restraint data. Facilities will be required to input data regarding seclusion and restraint incidents no later than the 15th of the subsequent month.)</p> <p><u>Individual reports to advocate:</u> 12 VAC 35-115-230(C)(4) requires that any seclusion or restraint that does not comply with the regulations or approved variances, or that results in injury to an individual, must be reported to the legally authorized representative and the assigned human rights advocate within 24 hours.</p> <p>The definition of restraint includes a definition of protective restraint. “Restraint” means the use of an approved mechanical device, physical intervention or hands-on hold, or pharmacological agent to involuntarily prevent an individual receiving services from moving his body to engage in a behavior that places him or others at risk. The</p>
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<p>Definitions 12 VAC 35-115-30 Complaint</p>	<p><u>Section of the regulation in question:</u> “Complaint” is an expression of dissatisfaction, grievance, or concern by, or on behalf of, an individual receiving services that has been brought to the attention of the provider, an employee of the provider, a human rights advocate, or the protection and advocacy agency, and alleges a violation or potential violation of these regulations or program policies and procedures related to these regulations. A complaint is “informal” when a resolution is pursued prior to contact with the human rights advocate. See 12 VAC 35-115-160.</p> <p><u>Clarification requested:</u> The phrase “brought to the attention of” is sometimes difficult to interpret in mental health because consumers may refer obliquely to a potential problem and staff are asking how far they have to go in pursuing a clarification if the consumer appears ambivalent or unwilling to proceed further.</p>	<p>The regulations promote the resolution of complaints at the lowest possible level. Complaints must allege a violation or potential violation of the regulations. If you are aware of such a complaint you should make every effort to pursue a resolution. Information should be solicited by the provider for clarification to the extent possible according to the consumer’s ability to contribute to the inquiry. The provider’s diligence in resolving such a complaint should not be deterred by the ambivalence of the consumer. The complaint process should be followed to completion. If a reasonable person would know that the consumer’s statement was a potential complaint, further investigation is warranted.</p>
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<p>Dignity 12 VAC 35-115-50, (E) (3-5)</p>	<p><u>Section of the regulation in question:</u> E. Exceptions and conditions to the provider's duties.</p> <p>3. If a provider has reasonable cause to believe that an individual's mail contains illegal material or anything dangerous, the director may open the mail, but not read it, in the presence of the individual. The director shall inform the individual of the reasons for the concern. An individual's ability to communicate by mail may also be limited if, in the judgment of a licensed physician or doctoral level psychologist (in the exercise of sound therapeutic practice), the individual's communication with another person or persons will result in demonstrable harm to the individual's mental health. The reasons for the restriction shall be documented in the individual's service record, the human rights advocate shall be notified prior to implementation.</p> <p>4. Providers may limit the use of a telephone in the following ways:</p> <p>a. Providers may limit use to certain times and places to make sure that other individuals have equal access to the telephone and that they can eat, sleep, or participate in an activity without being disturbed.</p> <p>b. Providers may limit use by individuals receiving services for substance abuse, but only if sound therapeutic practice requires the restriction and the human rights advocate is notified.</p> <p>c. Providers may limit an individual's access to the telephone if communication with another person or persons will result in demonstrable harm to the individual and is significantly impacting treatment in the judgment of a licensed physician or doctoral level psychologist. The reasons for the restriction shall be documented in the individual's service implementation.</p> <p>5. Providers may limit or supervise an individual's visitors when, in the judgment of a licensed physician or doctoral level psychologist, the visits result in demonstrable harm to the individual and significantly impact the individual's treatment; or when the visitors are suspected of bringing contraband or in any other</p>	
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<p>Offices, compositions and duties. 12 VAC 35-115-250 (D)</p>	<p><u>Section of the regulation in question:</u> D. The Local Human Rights Committee shall:</p> <p>6. Receive, review and comment on all restrictive behavioral treatment programs and seclusion and restraint policies for affiliated providers.</p> <p><u>Clarification requested:</u> What is the role of the Local Human Rights Committee when approving a behavioral treatment plan?</p> <p>It seems that the LHRC ends up “rereviewing” the work of existing groups (e.g.- internal review committees) because the delegation of responsibility is not clear enough.</p>	<p>LHRCs review behavioral treatment plans in accordance with the section of the regulations below. Their review is to ensure that all the steps in the regulations are met, including the pursuit of less restrictive alternates and that appropriate consent is obtained.</p> <p>LHRCs do not make review clinical decisions.</p> <p>12 VAC35-115-110-C.3</p> <p>3. Providers who use seclusion and restraint may use restraint or seclusion in a behavioral treatment plan, but only if the plan has been developed according to policies and procedures. All plans involving the use of restraints for behavioral purposes and all plans involving the use of seclusion shall be reviewed in advance by the LHRC. Such procedures shall ensure that:</p> <p>a. Plans are initiated, developed, carried out, and monitored by professionals who are qualified by expertise, training, education or credentials.</p> <p>b. Individual plans are submitted to and approved by an independent review committee, comprised of professionals with training and experience in applied behavior analysis, which shall assess the technical adequacy of the plan and data collection procedures; and the LHRC, which shall review the plans to ensure that the rights of the individuals are protected. All approvals shall be documented in the individual’s services record before implementation.</p> <p>c. Information about the individual plans or aggregate data about all plans is available anytime:</p> <p>(1) Upon request by the human rights advocate, the LHRC, the SHRC, the Inspector General, and the department; and</p> <p>(2) According to relevant reporting requirements.</p> <p>d. Seclusion and restraint shall only be included in plans:</p> <p>(1) To address behaviors that present an</p>
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<p>Provider requirements for reporting to the Department 12 VAC 35-115-230(D) (1 &2)</p>	<p><u>Section of the regulation in question:</u></p> <p>D. Providers shall collect, maintain and report the following information concerning human rights activities:</p> <ol style="list-style-type: none"> 1. The director shall provide to the human rights advocate, at least monthly, information on the type, resolution level and findings of each complaint of a human rights violation; reports shall be made to the LHRC upon request. 2. The director shall provide to the human rights advocate and the LHRC, at least monthly, reports regarding the implementation of any variances. <p><u>Clarification requested:</u></p> <p>Monthly reports for complaints and variances are required but no guidance on what the reports should look like.</p>	<p>The regulations do not specify the format for such reports. Providers should contact the human rights advocate in your area to see if he/she has developed a specific reporting form for these reports. Many advocates and LHRCs have developed reporting forms. If your advocate or LHRC has not developed such a form you may submit the information required in any format you choose.</p> <p>Regarding Variance reporting, frequently the LHRC or SHRC will state what information they want the provider to report on. If you are unclear about what to report talk to the human rights advocate in your area. The advocate will be able to provide you specific guidance for your situation.</p>
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<p>Offices, compositions and duties. 12 VAC 35-115-250(D)</p>	<p><u>Section of the regulation in question:</u> D. The Local Human Rights Committee shall:</p> <ol style="list-style-type: none"> 1. Consist of five or more members appointed by the SHRC. a. Membership shall be broadly representative of professional and consumer interests. At least one-third of the members shall be individuals who are receiving services and family members of similar individuals with at least two individuals who are receiving services or who have received within the five years of their initial appointment public or private mental health, mental retardation, or substance abuse treatment or habilitation services on each committee. <p><u>Clarification requested:</u></p> <p>The requirements for LHRC membership are too restrictive.</p>	<p>LHRC and SHRC membership is articulated in Section 37.1-84.3 of the Virginia Code. The regulations must be and are consistent with the Code.</p>
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